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December 23, 2009

E-File

**Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-001**

**ENTERED
Office of Proceedings**

DEC 23 2009

**Part of
Public Record**

**Re: STB Docket No. AB-6 (Sub-No. 468X), BNSF Railway Company –
Abandonment Exemption – In Kootenai County, ID**

Dear Ms. Brown:

**Attached for E-Filing is the Reply of BNSF Railway Company to the
Petition for Stay filed by Pan-American Railway, Inc.**

If you have any questions, please call me.

Sincerely,



Karl Morell

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-6 (SUB-NO. 468X)

**BNSF RAILWAY COMPANY
-- ABANDONMENT EXEMPTION --
IN KOOTENAI COUNTY, IDAHO**

REPLY TO STAY REQUEST

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Dated: December 23, 2009

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-6 (SUB-NO. 468X)

BNSF RAILWAY COMPANY
-- ABANDONMENT EXEMPTION --
IN KOOTENAI COUNTY, IDAHO

REPLY TO STAY REQUEST

BNSF Railway Company ("BNSF") hereby responds in Opposition to the Petition for Stay filed by Pan-American Railway, Inc., d.b.a. Post Falls-Coeur d'Alene, Railroad ("Pan-Am") purportedly on December 22, 2009¹ ("Stay Request").

BACKGROUND

On August 10, 2009, BNSF filed with the Board a petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10903 to abandon a 6.23-mile rail line located between milepost 6.10, near Post Falls, and milepost 12.33, at Coeur d'Alene, in Kootenai County, ID (the "Line"). BNSF also sought an exemption from the offer of financial assistance ("OFA") provisions at 49 U.S.C. § 10904 and the public use provisions at 49 U.S.C. § 10905.

On September 15, 2009, Pan-Am filed its Reply in Opposition to the requested exemption from Section 10904 ("Reply"). On September 30, 2009, the City of Coeur d'Alene ("City") filed a Statement of Support For Petition For Exemption. On October 2, 2009, North Idaho College Foundation ("Idaho College") and Stimson Lumber Company ("Stimson") filed separate replies to the Pan-Am Reply.

¹ Pan-Am's pleading cannot be deemed filed until it submits its filing fee.

On November 27, 2009, the Surface Transportation Board ("Board") issued its decision in this proceeding granting BNSF's requested exemption from Sections 10903 and 10905, but denying the requested exemption from Section 10904 ("November 27th Decision"). The November 27th Decision set December 7, 2009, as the deadline for the filing of an Offer of Financial Assistance ("OFA") and December 14, 2009, as the deadline for filing petitions for stay.

REPLY

The Stay Request should be rejected or denied on any one of three grounds.

First, Pan-Am's Stay Request was due by December 14, 2009. Pan-Am has not requested leave to late-file its Stay Request, nor has it demonstrated good cause for the acceptance of the late-filed Stay Request. Accordingly, the Stay Request should be summarily rejected.

Second, Pan-Am seeks a stay of the effective date of the November 27th Decision so that Pan-Am can seek valuation information from BNSF in order to file an OFA. The Board's rules, however, contemplate that requests for valuation information be made well before the Board issues its final decision.² Moreover, the deadline for filing an OFA expired on December 7th. Pan Am makes the nonsensical argument that "there was no occasion for [Pan-Am] to have filed a request for valuation information" because BNSF had sought an exemption from Section 10904. Stay Request at 2. Pan-Am's informational request could have been filed at any time after the Board issued the Notice of Exemption in this proceeding on August 28, 2009, and, as

² Pursuant to 49 C.F.R. § 1152.27(c)(1)(C), a potential offeror has 5 days from the service date of the final decision to petition the Board to toll the filing deadline for the OFA if the requested valuation information has not been provided by the abandoning railroad. In order to make such a tolling request, the request for valuation information would have had to have been already made.

previously noted, was due well before the service date of the final decision. At a minimum, Pan-Am should have made its request within the 10-day period for the filing of an OFA.

Pan-Am blames miscommunications for its tardy request for valuation information. Three months of miscommunications is hardly plausible and, in any event, do not constitute good grounds for the requested relief. Consequently, Pan-Am's request for information and Stay Request should be rejected.

In order to accommodate Pan-Am's Stay Request, the Board would also need to extend retroactively for a considerable period of time the filing date for an OFA. Through the OFA program, Congress sought to preserve rail service whenever there was a need for such service. At the same time, Congress sought to protect the abandoning railroad from bearing the financial burden of holding onto a dormant or unprofitable rail line for an extended period of time by establishing strict time frames for conducting the OFA process, including deadlines for making an OFA. *See H.R. Rep. No. 96-1430, 96th Cong., 1st Sess. 125* (the OFA provisions will "assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process"). Here, the Board need not balance these potentially conflicting interests since, as the evidence of record in this proceeding unequivocally demonstrates, there are no rail shippers located on the Line and there never will be any rail shippers located along the Line in the future.

Third, the burden is on Pan-Am to demonstrate conclusively that it has met the strict standards for the issuance of a stay. Pan-Am, however, has not even addressed the standards for a stay much less demonstrated that the requested relief is necessary or appropriate in the circumstances.

The standards governing disposition of a request for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). It is the movant's obligation to justify the exercise of such an extraordinary remedy, *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985), and the movant carries the burden of persuasion on each of the four elements required for the extraordinary relief. *Canal Authority of Fla. V. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

Pan-Am Is Unlikely To Prevail On The Merits

Pan-Am does not contend, much less demonstrate, that it will be permitted to file an OFA in this proceeding. In the November 27th Decision, the Board noted that Pan-Am's plans to return service to the Line "are speculative and contingent on facts that may well be outside of [Pan-Am's] control." Slip op. at 4. The Board went to note that, in order to be permitted to file an OFA, Pan-Am would need to demonstrate: "whether there is a demonstrable commercial need for rail service, as manifested by support from shippers or receivers on the line being abandoned or as manifested by other evidence of immediate and significant commercial need; whether there is community support for continued rail service; whether acquisition of freight operating rights would interfere with current and planned transit services; and whether continued rail service is operationally feasible." *Id.*

Given the evidence submitted by the City, Idaho College and Stimson in this proceeding, it is simply not possible for Pan-Am to restart service on the Line. There are no shippers located

on the Line and Pan-Am has failed to identify a single shipper who desires rail service to or from the Line. The Public-Private partnership cited by Pan-Am in its Reply does not exist. The parcels of land on which Pan-Am plans to locate its phantom shippers are not for sale and are owned by entities opposed to the reinstitution of rail service.

For example, one portion of the Line will be used to expand the City Park and for the construction of a new museum building. Other portions of the Line will be used to: (1) support expansion of North Idaho College, University of Idaho and Lewis Clark State College; (2) provide increased street access to the City's oldest neighborhood; (3) allow the expansion of the North Idaho Centennial Trail; and (4) allow urban development, including an Institute for Advanced Study of Waste Water Treatment. The City also seeks to incorporate a section of the Line in the Centennial Trail. Under these circumstances, Pan-Am cannot demonstrate a need for rail service.

Denial Of The Stay Will Not Cause Pan-Am Irreparable Harm

An administrative decision is not ordinarily stayed without an appropriate showing of irreparable harm. *Permian Basin Area Rate Case*, 390 U.S. 747, 777 (1968). Pan-Am has failed to allege much less demonstrate that anyone will suffer irreparable harm in the absence of a stay. Indeed, a denial of the Stay Request will be of financial benefit to the owner of Pan-Am by precluding him from squandering what limited financial resources he may have on another one of his unrealistic and fanciful schemes.

A Stay Would Harm BNSF And Certain Public Entities In Coeur d' Alene

Granting the stay would harm BNSF in two respects. First, BNSF would have to incur the expense of providing Pan-Am the requested valuation information which information will ultimately be useless to Pan-Am because it will never be able to demonstrate a need for rail service on the Line. It is also highly unlikely that Pan-Am will be able to demonstrate that it is

financially responsible. Second, the salvaging of the Line and the sale of the underlying real estate will be delayed to the financial detriment of BNSF.

By delaying the planned uses of the corridor, the granting of a stay would also harm the City, North Idaho College, University of Idaho and Lewis Clark State College.

A Stay Is Not In The Public Interest

Pan-Am has failed to demonstrate how issuance of a stay would further the public interest. The record in this proceeding demonstrates that portions of the Line are needed for important public purposes. Consequently, granting the stay would be contrary to the public interest.

CONCLUSION

BNSF respectfully urges the Board to reject or deny Pan-Am's Stay Request. The Stay Request is late-filed and the deadline for filing an OFA has expired. Moreover, the Stay Request falls woefully short of meeting the criteria for a stay.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karl Morell", is written over a horizontal line.

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Dated: December 23, 2009

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of December, 2009, I had the foregoing Reply served by first class mail, postage pre-paid on all parties of record.


Karl Morell